No. 78-1945

In the
Supreme Court of the United States
OCTOBER TERM, 1978

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Opinions Below 1

Question Presented 2

Statement of the Case 3

There Are No Special and Important Reasons for the Grant of Certiorari in This Case 10

I. The Court of Appeals Has Not Decided a Question of Federal Law Which Has Not Been But Should Be Settled By This Court. It Has Not Decided a Federal Question In a Way In Conflict With Applicable Decisions of This Court 10

A. The Seventh Circuit was manifestly correct when it ruled that "the provisions of the Davis-Bacon Act must be read into [the 'Labor Provisions' article of this government contract] when, pursuant to a contract requiring Davis-Bacon Act work, the defendant [petitioner] performs 'construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers.'" 10

B. Where a government contract clause is required by statute or by procurement regulation to be included in a government contract, that clause is deemed incorporated, as a matter of law, into the contract. The Davis-Bacon Act minimum wage stipulation is part of the subject government contract by operation of law, and employees who perform Davis-Bacon Act work must be paid the minimum wage rates established by the Secretary of Labor's published wage determinations 12

PAGE

1. The Davis-Bacon Act mandatory requirement 12
2. Incorporation of Mandatory Clauses—the "Christian Doctrine" 14

C. A contractor takes a government contract subject to all applicable statutes. All statutes relating to the subject matter of the contract and existing at the time of contracting become a part thereof and must be read into the contract. Our petitioner contractor-employer is charged with knowledge that construction work performed by its employees is subject to the Davis-Bacon Act, and is obligated to pay the statutory wage rates 20

1. Davis-Bacon Act is part of all government construction contracts 20
2. Petitioner's acts imply assumption of Davis-Bacon obligations 22
3. The Davis-Bacon Act Congressionally-mandated effects on the procurement process 24

II. The Supreme Court Will Consider Only the "Question Presented" By the Petitioner and Those Questions Fairly Comprised Therein. The Question Presented by Petitioner Concerns Contract Interpretation and the Impact of the Davis-Bacon Act on the Interpretation of Its Government Contract. Arguments By Petitioner To the Effect That Respondent has No Right of Action Under or By Reason of the Act, and That Respondent Has Failed to Exhaust Administrative Remedies, Are Not So Fairly Comprised and Have Already Been Recently Considered By This Court Twice in Related Litigation 26

Conclusion 29

Table Of Authorities

Cases

PAGE

Ainslie Corp. v. Middendorf, 381 F.Supp. 305 (D.Mass. 1974) 14

Antoni v. Greenhow, 107 U.S. 769, 2 S.Ct. 91 (1883) .. 21

Armour Packing Co. v. United States, 209 U.S. 66, 28 S.Ct. 428 (1907) 21

Assn. of American Railroads v. Castle, 562 F.2d 1310 (C.A. D.C. 1977) 12

Board of Supervisors v. Lackawanna Iron & Coal Co., 93 U.S. 619, 23 L.Ed. 989 (1877) 23

Bulkley v. United States, 86 U.S. 37 (1874) 23

Bushman Construction Co. v. Conner, 260 F.Supp. 779 (D. Colo., 1966) 23

City of Tullahoma v. Coffee County, 204 F.Supp. 794 (E.D. Tenn. 1962), rev'd on other grounds 328 F.2d 683 (C.A. 6, 1964) 15

Compagnie Generale Transatlantique v. American Tobacco Co., 31 F.2d 663 (C.C.A. 2, 1929) 18

Coutu v. Universities Research Association, Inc., 595 F.2d 396 (C.A. 7, April 4, 1979) 1, 5, 9, 27

Everett Plywood Corp. v. United States, 512 F.2d 1082 (Ct.Cl. 1975) 24

Farmers & Merchants' Bank v. Federal Reserve Bank, 262 U.S. 649, 43 S.Ct. 651 (1923) 20

G. L. Christian and Associates v. United States, 312 F.2d 418, 160 Ct.Cl. 1, opinion on reargument denied 320 F.2d 345, 160 Ct.Cl. 58, certiorari denied, 375 U.S. 954 (1963), rehearing denied 376 U.S. 929, 377 U.S. 1010 (1964) 15, 16, 17

Hartford Accident & Indemnity Co. v. N. O. Nelson Mfg. Co., 291 U.S. 352, 54 S.Ct. 392 (1934) 19

PAGE

Hendrickson v. Apperson, 245 U.S. 105, 38 S.Ct. 44 (1917) 21

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231 (1934) 20

Maryland-National Capital Park Commission v. Lynn, 514 F.2d 829 (C.A. D.C. 1975) 22

McDaniel v. University of Chicago, 512 F.2d 583 (C.A. 7, 1975), vacated and remanded, 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 30 (1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780 (1978) 9, 27

M'Cracken v. Haywood, 11 L.Ed. 397 (1844) 21

Northern Pacific Ry. Co. v. Wall, 241 U.S. 87, 36 S.Ct. 493 (1916) 21

Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 6 L.Ed. 606 (1827) 10, 21

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972) 24

Personal Industrial Bankers, Inc. v. Citizens Budget Co., 80 F.2d 327 (C.C.A. 6, 1935) 22

Southern Surety Co. v. Oklahoma, 241 U.S. 582, 36 S.Ct. 692 (1916) 21

United States v. Binghamton Construction Co., 347 U.S. 171, 74 S.Ct. 438, rehearing denied 347 U.S. 940, 74 S.Ct. 625 (1954) 11, 13

United States v. McKinnon, 289 F.2d 908, (C.A. 9, 1961) 21

United States v. New Orleans Public Service, Inc., 553 F.2d 459 (C.A. 5, 1977) 15, 18

United States ex rel. Von Hoffman v. City of Quincy, 71 U.S. 535 (1867) 21

Walker v. Whitehead, 83 U.S. 314, 21 L.Ed. 357 (1873) 21

Woods v. Lovett, 313 U.S. 362, 61 S.Ct. 983 (1941) .. 20

Statutes

PAGE

Contract Disputes Act of 1978, 41 U.S.C. §§601-613, P.L. 95-563 26

Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-333 15

Copeland (Anti-Kickback) Act, Section 2, 40 U.S.C. §276c 2, 14

Davis-Bacon Act, 40 U.S.C. §§276a-276a-7 ..... 2, 6, 8, 12, 15, 20, 24, 25

Department of Energy Organization Act of 1977, P.L. 95-91, §7194 (Title V, §504, 91 Stat. 590) 26

Freedom of Information Act, 5 U.S.C. §552 *et seq.* ..4, 23

McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§1-57 ..... 15, 25

Reorganization Plan No. 14 of 1950, 5 U.S.C. note, 15 F.R. 3176, 64 Stat. 1267 14

Walsh-Healey Public Contracts Act, 41 U.S.C. §§35-45 ..... 15, 25

Wunderlich Act, 41 U.S.C. §§321-322 26

Rules and Regulations

Rules of the Supreme Court of the United States, Rule 23-1(c) 2, 29

Regulations of the Department of Labor, 29 C.F.R. §3.11 (1978 ed.) 14

Regulations of the Department of Labor, 29 C.F.R. §5.5(a) (1978 ed.) 2, 14

Disputes Clause, AEC/ERDA/DOE Regulations, 41 C.F.R. §9-7.802-5 (1978 ed.) 26

Equitable Adjustments Clause, AEC/ERDA/DOE Regulations, 41 C.F.R. §9-1.5004-2 (1978 ed.) 26

LEGISLATIVE HISTORY

PAGE

H.R.Report 1162, 74th Cong., 2nd Sess. (concerning Davis-Bacon Act) 25

S. Report 1157, 74th Cong., 1st Sess. (concerning Walsh-Healey Act) 25

H.R. Report 948, 89th Cong., 1st Sess. (concerning Service Contracting Act) 25

H.R. Report 91-468, 91st Cong., 1st Sess. 25

Senate Report 91-427, 91st Cong., 1st Sess. 25

1 Commission on Government Procurement Report (1969 Commission on Government Procurement) .. 25

TEXTBOOKS AND MISCELLANEOUS

Opinion of the Attorney General of the United States (March 9, 1979), 1979 Labor Law Reports (C.C.H.), ¶31,253 (4-13-79) 25

17 Am. Jur. 2d, Contracts, §257, at 654-656 (1964 ed.) 21

3 Corbin on Contracts, §51, at 197 (1960 ed.) 21

3 Corbin on Contracts, §551, at 200-201 (1960 ed.) 19

17A Corpus Juris Secundum, Contracts, §330, at 295 (1963 ed.) 21

17A Corpus Juris Secundum, Contracts, §330, at 301 (1963 ed.) 19

91 Corpus Juris Secundum, United States, §89, at 170 (1955 ed.) 24

Dees and Ginsburg, Contract Interpretation and Defective Specifications (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University) 15

Williston on Contracts, §615, at 1767 (1936 ed.) 21

4 Williston on Contracts, §615, at 597 (3d ed. 1961) .. 21

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Stanley E. Coutu, on his behalf and on behalf of the class he represents,[1] opposes the Petition for Writ of Certiorari filed by petitioner on June 30, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing a summary judgment granted on motion of the petitioner and remanding for further proceedings, is reported at 595 F.2d 396 (April 4, 1979) and is reproduced as Appendix A to the Petition. The two unreported memorandum orders by different District Judges referred to in the Court of Appeals

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[1] The respondent class has been certified. See *Coutu v. Universities Research Association, Inc.*, 595 F.2d 396, 397 (C.A. 7, 1979), and Appendix A at A2-A3.

opinion, are printed in their entirety as Appendix B and Appendix C to the Petition.[2]

QUESTION PRESENTED

Respondent submits that the petition does not contain, as required by Supreme Court Rule 23-1(c), a question presented "expressed in the terms and circumstances of the case." Without waiver of this point or of his position that there are no special and important reasons for the grant of certiorari in this case, respondent suggests that the appropriate question would be:

Is a prime contractor under a government contract exempted as a matter of law from the statutory duty to pay Davis-Bacon Act (40 U.S.C. §§276a-276a-7)[3] minimum wages to its own employees, and is that government contract therefore insufficient in law as a basis for recovery of those unpaid minimum wages, when:

(a) the government contract expressly procures "construction, alteration and/or repair" work (see 40 U.S.C. §276a),

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[2] The appeal was from a summary judgment allowed by the second District Judge, based on an affidavit of petitioner's counsel that no Davis-Bacon Act contract clause (see contract clauses specified by the Department of Labor, 29 C.F.R. §5.5(a)) requiring petitioner to pay Davis-Bacon minimum wages to its *own* employees for construction work was contained in petitioner's government contract (see Appendix C). The first District Judge had rejected that same contention when he denied petitioner's prior motion to dismiss the suit (see Appendix B).

[3] Certain portions of the Davis-Bacon Act, and a related section of the Copeland (Anti-Kickback) Act (40 U.S.C. §276c), are reproduced as Appendix D to the Petition.

(b) the prime contractor uses its own employees to perform certain construction work called for by the contract,

(c) the contract requires the contractor to include Davis-Bacon Act wage stipulations in subcontracts entered into for construction work, but contains no express stipulation requiring the contractor itself to comply with the Act as to construction work performed with its own employees, and

(d) applicable prevailing wage determinations by the Secretary of Labor are published in the Federal Register in accordance with law.

STATEMENT OF THE CASE

The petitioner's "Statement of the Case" contains a number of inaccuracies. Among them are the following:

(a) Petitioner's construction contractor status. *Petitioner's statement* characterizes its government contract as requiring it simply to "provide scientific and technical management services to the United States in connection with the construction and operation of Fermi National Accelerator Laboratory" (petition, at 3). *The fact is* that the government contract makes petitioner responsible for the "two categories of work contemplated by this contract" which are

> "a. Construction: Includes design, fabrication or procurement, erection, test and inspection, assembly and installation of the systems, components, buildings, etc., comprising the accelerator and the conventional facilities, as described * * * below.
>
> "b. Research and Development: * * *." [Appendix "A" to Contract, at p. 1.].

Further, by Supplemental Agreement dated April 6, 1972 "effective as of July 1, 1971" the contract was revised, certain prefatory Recitals stating, *inter alia,*

> "The Association has heretofore undertaken, pursuant to the terms and conditions of the basic Contract No. AT (49-8)-3000, the design and construction of an accelerator and related facilities * * *
>
> "Accordingly, this contract sets forth the terms and conditions, and the purposes and policies under which the Association shall continue the design and construction of the accelerator and related facilities * * *." [Modification No. 14 to Contract No. AT (4908)-3000, at p. 1.]

And if that were not enough to demonstrate that petitioner is the contractor primarily responsible for the construction called for by the contract, we also have petitioner characterizing itself as *"This Federally assisted construction contractor"* in a November 25, 1968 certification to the government that it does not maintain segregated facilities for its employees "under its Prime Contract No. AT (4908)-3000".[4]

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[4] The contract, originally dated January 23, 1968, "effective as of January 5, 1967" is not in the trial court record and, of course, not therefore in the Record on Appeal in the Court of Appeals. It, or portions of it, may have been furnished to the district court by the petitioner, although not to the respondent or the respondent class. Respondent has secured a copy of the contract, or portions of it, through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.* Discovery procedures initiated by the respondent and his class prior to submission by petitioner of the summary judgment motion which resulted in the district court judgment reversed in this case by the Seventh Circuit, including procedures for production of documents (see Appendices filed in Court of Appeals, Appendix F, at 39-44, entitled "Amended First Request to Produce"), were stayed pending

(b) The summary judgment legal issue. *Petitioner's statement* asserts that its motion for summary judgment was predicated upon the failure by respondent to show that "the [contracting] agency had rendered a Davis-Bacon Act coverage determination regarding work he performed" and that "Petitioner's general counsel submitted an affidavit that no such determination had been made" (petition, at 5). *The fact is* that this was not and had never been the issue on the summary judgment motion, and petitioner thus misquotes the contents both of its summary judgment motion and its general counsel's affidavit submitted in support. The sole issue on the summary judgment motion, the granting of which was reviewed in and reversed by the Seventh Circuit, was

> "whether or not [petitioner] has entered into [a contract based upon provisions of the Davis-Bacon Act]" (Motion for Summary Judgment, paragraph "(2)").[5]

And petitioner's general counsel's affidavit—which petitioner describes as supporting its claim that "the agency had rendered [no] Davis-Bacon Act coverage determina-

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(4 Continued)
disposition of the said motion and determination of the legal question presented. See also *Coutu* opinion, 595 F. 2d 396, at 397, and Appendix A at A2-A3. ("Discovery was apparently stayed in February 1977" and fn. 3 "Defendant's brief nowhere disputes the stay. An earlier discovery stay was ordered by Judge McGarr on December 22, 1975"). It is apparent that there may be other agreements and documents, yet to be discovered, concerning petitioner's Davis-Bacon duties.

[5] Paragraph "(2)" of the Motion for Summary Judgment reads in full that: "(2) The only material issue is whether or not Defendant has entered into such a contract." (*Appendices* filed in the Court of Appeals, Appendix I, at 47).

tion regarding work [respondent] performed" (petition, at 5)—speaks only of the absence of express Davis-Bacon Act wage stipulations from petitioner's government contract. It says nothing at all about determinations made or not made by the contracting agency concerning the contract construction work or concerning respondent's share in that work. It simply says:

> "3. No Davis-Bacon Act, 49 U.S.C. §276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said contract No. EY-76-C-02-3000.
>
> "4. Further the affiant sayeth not." (*Appendices* filed in the Court of Appeals, Appendix J, at 49).

Finally, the district judge who allowed the summary judgment which the Seventh Circuit reversed, was also under no misconception about the legal issue he was deciding. The actual question was whether petitioner is exempt as a matter of law from the statutory duty to pay Davis-Bacon Act minimum wages for the sole reason that its government contract does not expressly require it to comply as to construction work performed with its own employees. Granting that judgment, he said:

> "This court concludes that there is no issue of material fact that this contract fails to contain the requisite Davis-Bacon Act specifications essential for maintenance of the claim stated in Count II. Accordingly, this court enters judgment for defendant on Count II of the complaint and that count is dismissed." (See *Memorandum Order*, Appendix C at A27).

(c) Alleged search for so-called "coverage determinations". *Petitioner's statement* further asserts, without any warrant in the record, that respondent has attempted to

discover some Davis-Bacon Act "coverage determination regarding work [respondent] performed [but] found none" (petition, at 5). *The fact is* that respondent, individually and on behalf of his class, relies on the explicit "coverage determination" of the Davis-Bacon Act itself. Neither the rights of the respondent under the Act—nor the rights of the respondent class—depend upon the existence of a contracting agency (AEC/ERDA/DOE) ruling that this respondent was performing Davis-Bacon work. Further, it is clear that were contracting-agency "coverage" rulings required to entitle respondent or his class to the Davis-Bacon Act minimum wage, the stay of discovery pending disposition of the summary judgment legal issue, previously described (see fn. 4, *supra*), has made it procedurally impossible at this point in the proceedings to establish their existence and application to the work assignments actually given to respondent and his class by the petitioner-employer-contractor.[6]

(d) Did the Seventh Circuit "alter" or "revise" the contract? *Petitioner's statement* asserts—as if it were a matter of fact—that the Court of Appeals "held that

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[6] Of course, respondent would welcome the existence of AEC/ERDA/DOE rulings that he and the others in his class were performing Davis-Bacon Work. At this point, limited discovery has revealed a number of items recommending that certain work projects under the prime contract be treated as Davis-Bacon Act work. Discovery has not yet proceeded to the point where it can be learned whether respondent and other class members were assigned some of that work. However, the question of the existence and availability of those items and that information, is quite different from the question actually posed by the summary judgment motion and actually ruled on by the district and circuit judges who considered the summary judgment issue in this case.

the District Court did have jurisdiction * * * to revise the contract" (petition, at 5). This assertion, with the single substitution of the word "alter", draws our attention once again to petitioner's "Question Presented" (petition, at 2), upon the propriety of which respondent has previously commented (this brief, at 2). It is of course understandable that a petitioner seeking certiorari might harshly characterize the adverse decision. But it is respectfully submitted that a petitioner should, at least in his "Statement of the Case", state the facts—not his interpretation, nor an altered or revised version of the facts. *The fact is* that the Seventh Circuit applied long-settled principles of statutory construction to the provisions of the Davis-Bacon Act, and equally-well-settled principles of contract (and government contract) interpretation to the contract here in question. *The fact is* that the Seventh Circuit did not "alter" or "revise" that contract. *The fact is* that the court held, *inter alia,* as follows:

> "[H]ere, the provisions of the Davis-Bacon Act must be read into Article XXXIII [the 'Labor Provisions' article of the contract] when, pursuant to a contract requiring Davis-Bacon Act work, the defendant [petitioner] performs 'construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers.' * * * 40 U.S.C. §276a.
>
> "Indeed, in a January 23, 1973, letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both those parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the

Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* [*McDaniel* v. *University of Chicago*, 512 F.2d 583 (C.A. 7, 1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed. 2d 780] the contract was already so modified by operation of law, amendments to the contract were not needed to accomplish that result.

"*McDaniel* was not an isolated instance of reading applicable statutory requirements into government contracts. We were merely following precedents established as early as 1827 and applied consistently thereafter. [footnote citations] Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act 'stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in' the contract * * * is insufficient to support the grant of summary judgment. Therefore it was unnecessary for plaintiff [respondent] to tender a counter-affidavit.

"It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity has been performed. [footnote citations to wage determinations]. Therefore the district court was mistaken in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties." [*Coutu* v. *Universities Research Association, Inc.*, 595 F.2d 396, 399-400 (C.A. 7, April 4, 1979); also Appendix A at A7-A9].

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THE GRANT OF CERTIORARI IN THIS CASE.

I.

THE COURT OF APPEALS HAS NOT DECIDED A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. IT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Seventh Circuit was manifestly correct when it ruled that "the provisions of the Davis-Bacon Act must be read into [the 'Labor Provisions' article of this government contract] when, pursuant to a contract requiring Davis-Bacon Act work, the defendant [petitioner] performs 'construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers.'"

Contrary to the petitioner's claim, the ruling of the Seventh Circuit is neither "novel" nor "unprecedented" by prior decisions of this Court and of other courts and authorities in the area of contract law generally, and public contract law in particular. Contrary to petitioner's assertion, the Seventh Circuit's decision is not a "departure"—much less a "wholesale departure"[7]—from existing law relative to government contracting.

The Court of Appeals has followed established precedent existing in this Court since at least 1827 (e.g., "the law of the contract * * * forming a part of it")[8]. The

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[7] See petition, at 6.

[8] *Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 212, 6 L.Ed. 606, 621-622 (1827), cited by the Court of Appeals at 595 F.2d 396, 400. See Appendix A at A8.

Court of Appeals has complied with mandate of Congress consistently reaffirmed by Congress and by this Court since 1931 that the Davis-Bacon Act is to be applied to "protect * * * employees from substandard earnings by fixing a floor under wages on Government projects".[9] And the Court of Appeals has recognized the express contractual intent, found in the petitioner's 1968 government contract and in contract documents since that date, that Davis-Bacon requirements must apply concerning Davis-Bacon work contemplated by that prime contract.[10]

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[9] *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177, 74 S.Ct. 438, 441, rehearing denied 347 U.S. 940, 74 S.Ct. 625 (1954).

[10] It is, indeed, impossible to conceive how petitioner can at this date claim lack of knowledge that in its capacity as contractor or subcontractor it must pay Davis-Bacon minimum wages to its employees whom it assigns to do Davis-Bacon work, when (a) the statute says it, (b) the cases say it, (c) the Department of Labor regulations say it, (d) the G.S.A. and AEC/ERDA/DOE regulations say it, (e) the contract itself says that it must include Davis-Bacon clauses in subcontracts it enters into for others to do such work, and (f) documents involving the contract say that Davis-Bacon stipulations are to apply if its own employees do such work.

B. Where a government contract clause is required by statute or by procurement regulation to be included in a government contract, that clause is deemed incorporated, as a matter of law, into the contract. The Davis-Bacon Act minimum wage stipulation is part of the subject government contract by operation of law, and employees who perform Davis-Bacon Act work must be paid the minimum wage rates established by the Secretary of Labor's published wage determinations.

1. **The Davis-Bacon Act mandatory requirement.** Section 1 of the Davis-Bacon Act (40 U.S.C. §276a) requires, *inter alia,* that

> "every contract * * * **shall** contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers * * * the full amounts accrued at time of payment, computed at wage rates not less than those [determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the (locality) in which the work is to be performed]. (Emphasis supplied).

The requirement that every contract involving construction on government projects **shall** contain the required minimum wage stipulation, cannot be construed as anything but mandatory. As was recently said in *Assn. of American Railroads* v. *Castle,* 562 F.2d 1310, 1312 (C.A. D.C. 1977), "The word 'shall' is **the language of command in a statute,** and there is no doubt that the Congress has commanded [what the statute requires]."

But we need not rely alone on mere, albeit accurately applicable generalizations. This Court has *already* authoritatively construed the Davis-Bacon Act as mandatory. In

United States v. *Binghamton Construction Co.*, 347 U.S. 171, 74 S.Ct. 438 (1954), rehearing denied 347 U.S. 940, 74 S.Ct. 625, a decision in which—as here—a government contractor claimed that the wage rates expressly contained in its contract amounted to a binding representation or warranty as to the wage rates which it must actually pay its workers for Davis-Bacon work, it was declared (347 U.S. at 172, 74 S.Ct. at 439):

> "**The Davis-Bacon Act requires that the wages** of workmen on a Government construction project **shall be 'not less' than the 'minimum wages'** specified in a schedule furnished by the Secretary of Labor." [Emphasis supplied.]

And, concluding—as the Seventh Circuit has concluded in the case at bar—that the contractor's contention must be rejected, this Court further noted (347 U.S. at 178, 74 S.Ct. at 442):

> "On its face, the Act is a minimum wage law designed for the benefit of construction workers. **The Act does not authorize or contemplate any assurance** to a successful bidder **that the specified minima will in fact be the prevailing rates.** Indeed, its requirement that the contractor pay 'not less' than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, **even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation** in computing its bid **cannot be said to have been justified.** [Emphasis supplied.]

Further, it is not only the Davis-Bacon Act itself and the decisions of this Court construing it, which mandate the inclusion of the minimum wage stipulation in our contract. The regulations issued by the Secretary of Labor

pursuant to 40 U.S.C. §276c[11] and Reorganization Plan No. 14 of 1950,[12] complement the requirements of the Act by commanding a like incorporation of the applicable regulations, among which are included the standard contract clauses which stipulate compliance with the Act's minimum wage obligations. Thus the Secretary's regulation §3.11 (29 C.F.R. §3.11 (1978 ed.)) reads:

> **§3.11 Regulations part of contract**
>
> "All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part **shall** expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see §5.5(a) of this subtitle [which contains the specific contract provisions]." [Emphasis supplied.]

Here, too, there is no doubt that "the verb 'shall' in the regulation is mandatory", *Ainslie Corp.* v. *Middendorf*, 381 F.Supp. 305, 308 (D.Mass. 1974).

2. Incorporation of Mandatory Clauses—the "Christian Doctrine". It is clear that the Davis-Bacon Act minimum wage provisions represent long-standing and fundamental procurement policies of the United States. The cases which deal with government contracts teach that contract clauses made mandatory by **procurement regulation,** are incorporated into government contracts as a matter of law. Is it not even more certain that con-

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[11] Section 2 of the Copeland (Anti-Kickback) Act of June 13, 1934, c. 482, 48 Stat. 948; as amended May 24, 1949, c. 139, §134, 63 Stat. 108, and August 28, 1958, P.L. 85-800, §12, 72 Stat. 967.

[12] 5 U.S.C. §903 note, 15 F.R. 3176, 64 Stat. 1267.

tract clauses made mandatory by **statute** are so incorporated as a matter of law! Dees and Ginsburg, *Contract Interpretation and Defective Specifications* at 4 (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University); *G.L. Christian and Associates* v. *United States,* 312 F. 2d 418, 160 Ct. Cl. 1, opinion on reargument denied 320 F. 2d 345, 160 Ct. Cl. 58, certiorari denied 375 U.S. 954 (1963), rehearing denied 376 U.S. 929, 377 U.S. 1010 (1964) See also, e.g., *United States* v. *New Orleans Public Service, Inc.,* 553 F.2d 459 C.A. 5, 1977); *City of Tullahoma* v. *Coffee County,* 204 F. Supp. 794 (E.D. Tenn. 1962), rev'd on other grounds 328 F. 2d 683 (C. A. 6, 1964).

In Dees and Ginsburg, *Contract Interpretation and Defective Specifications* (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University), the authors note:

> "Surprisingly, there are very few federal statutes which directly affect the performance of a Government contract. There are, of course, the basic statutes authorizing the Government to enter into contracts and placing certain limitations on the methods of contracting. * * * Federal statutes and executive orders affecting performance include those that require equal employment opportunity requirements on contractors doing business with the Government, those that impose certain **minimum standards for wages** and working conditions of employees working for Government contractors [citing the Walsh-Healey Act, 41 U.S.C. §§35-45; the Davis-Bacon Act, 40 U.S.C. §276(a); the Service Contract Act of 1965, 41 U.S.C. §§1-57; the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-333] and those which require protection of the environment. * * *" [Ibid., at 1-2; emphasis supplied.]

Then, speaking of the binding effect of statutory requirements and implementing regulations, we are reminded:

> "Statutory requirements and regulations which implement statutory requirements have the **force and effect of law**. Accordingly, contracts made in violation of such requirements are illegal. * * *" [Ibid., at 3.]

And, finally, concerning the question whether government contracts are to be interpreted as incorporating mandatory clauses specified by law, in order to preclude invalidation of those contracts for violation of statutory and regulatory requirements or otherwise:

> "It is common for Government contracts to include standard clauses and specifications by reference. These should present no problem to the contractor who has read the contract and is aware that these additional provisions are binding on the parties. A problem of interpretation does arise, however, when one party seeks to incorporate a contract clause which is not referenced in the contract but which is required by regulation.
>
> "In *G. L. Christian & Associates* v. *United States,* the Court of Claims held that the Termination for Convenience clause which had been consciously omitted by the Government (and the contractor) had the force and effect of law and was incorporated in the contract as a matter of law. The Court emphasized the fact that **pertinent regulations made the incorporation of the clause in a contract mandatory** and that a Termination for Convenience clause was historically an important component of a Government contract.
>
> "How broad is the '*Christian* doctrine' and does it apply to all mandatory clauses or only to certain ones? Until recently, the prevailing view was that the *Christian* doctrine applied to all provisions of

> the regulations which make the use of a particular contract clause mandatory. However, there is a growing minority view which believes that the *Christian* doctrine should be restricted to the incorporation of only those mandatory clauses which implement **long-standing and fundamental procurement policies of the United States.**" [Ibid., at 4; emphasis supplied.]

Thus, under both the prevailing view and the so-called developing minority view, we must recognize that the Davis-Bacon Act minimum wage stipulations are part of the subject government contract and binding on the petitioner.

So far as the *Christian* case opinions themselves are concerned (*Christian I,* 312 F.2d 418, 160 Ct.Cl. 1 (1963); and *Christian II,* 320 F.2d 345, 160 Ct.Cl. 58 (1963)), it should be noted that there the contractor's prime objection to the "incorporation" doctrine was that the subject contract clause was required only by "pre-existing **regulation**", the court pointing out that there was *no* question but that "if a **statute** requires the inclusion of a termination clause, such a provision would be read into the agreement **whether the negotiators put it there or not**". (320 F.2d at 350; emphasis supplied). And, speaking further concerning the "incorporation" doctrine, the Court of Claims said (320 F.2d at 350-351):

> "[A]s the Supreme Court cases demonstrate, 'mere' regulations can supersede state laws which would otherwise control; giving the regulations the status of law equates them fully to federal legislation. **The concept of such incorporation is not novel.** A well-known example is Executive Order No. 9001 (implementing the First War Powers Act), supra, which expressly required, without *specific* statutory foundation, that World War II contracts should contain

> a covenant-against-contingent-fees, as well as an anti-discrimination clause. **If the contracts were to be deemed valid, these articles had to be read as part** of all war procurement agreements, whether or not they were physically incorporated. * * * It was important then, and it is important now, that **procurement policies set by higher authority not be avoided or evaded** (deliberately or negligently) **by lesser officials, or by a concert of contractor and contracting officer. * * * Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against** *ad hoc* **encroachment or dispensation by the executive** [citation].
>
> "Like other individuals who deal with the Federal Government [citation], potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make. Our concern is not at all whether the policy of embodying mandatory contractual provisions in regulations is the best one. Our special interest is only the legality of such a practice, and we hold that, in the procurement field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government." [Italics by the court; other emphasis supplied.]

See too, *e.g.*, *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 469 (C.A. 5, 1977), holding "**the clause is incorporated into the contract, even if it has not been** expressly included in a written contract or **agreed to by the parties**; *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F.2d 663, 666 (C.C.A. 2, 1929), holding that "a lawful statute in force at the time the contract was made is read into the contract and becomes part of it" and "Such a **contract must be and is deemed**

to be modified to conform to the statute"; 3 *Corbin on Contracts,* §551, at 200-201 (1960 ed.), noting the same result "even though the parties **know nothing** of the statute and do not include the provision, and **even though they know of it and expressly agree upon the exact contrary"**; 17A Corpus Juris Secundum, *Contracts,* §330, at 301 (1963 ed.), noting that "where a provision is integrated into a contract by force of statute, as a matter of public policy, it must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it".

Also of particular significance on this point is this Court's opinion in *Hartford Accident & Indemnity Co.* v. *N. O. Nelson Mfg. Co.,* 291 U.S. 352, 54 S.Ct. 392 (1934), where the Court required that a contractor's bond be construed to include a clause required by state statute but omitted from the express terms of the bond, and said:

> **"All that the statute does** by force of section 3 **is to standardize the form,** at least in some particulars, when bonds are freely given, and to define the consequences attaching to the standard thus prescribed. * * * The business of insurance is one peculiarly subject to supervision and control [citations.] The Fourteenth Amendment does not make it necessary that materialmen and **laborers** shall be deprived of **fair protection** to the end that sureties for profit may be given an opportunity to diversify their bonds.
>
> "Liberty of contract is not an absolute concept. [citations.] It is relative to many conditions of time and place and circumstance. The Constitution has not ordained that the forms of business shall be cast in imperishable moulds. There is no question here of the impairment of the obligation of a contract by later legislation. The act assailed by the appellants was in existence for many years before the bond in

suit was written. Principal and surety in writing it became **subject to the statutes then in force, and by these they must abide.**" [291 U.S. at 359, 360-361; 54 S.Ct. at 395-396; emphasis supplied.]

C. A contractor takes a government contract subject to all applicable statutes. All statutes relating to the subject matter of the contract and existing at the time of contracting become a part thereof and must be read into the contract. Our petitioner contractor-employer is charged with knowledge that construction work performed by its employees is subject to the Davis-Bacon Act, and is obligated to pay the statutory wages rates.

1. Davis-Bacon Act is part of all government construction contracts. Whether or not the mandatory stipulation required by the Davis-Bacon Act to be included in "every contract * * * for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works * * *" is deemed incorporated, as a matter of law, into the contract, it is basic hornbook law that the Davis-Bacon Act itself is a part of the contract. Statutes relating to the subject matter of a contract and existing at the time of execution of such contract, become a part thereof and must be read into the contract, as if they were expressly referred to or incorporated in its terms.

See, *e.g.*, *Woods* v. *Lovett*, 313 U.S. 362, 370, 61 S.Ct. 983, 987 (1941) ("laws which subsist * * * enter into and form a part of it, as if they were expressly referred to or incorporated in its terms"); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 429-430, 54 S.Ct. 231, 237 (1934) (concerning Minnesota Mortgage Moratorium Law); *Farmers' & Merchants' Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660, 43 S.Ct. 651, 655 (1923) ("This

principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge"); *Hendrickson* v. *Apperson,* 245 U.S. 105, 38 S.Ct. 44, 45 (1917) (Kentucky statute authorizing appointment of special collectors); *Northern Pacific Ry. Co.* v. *Wall,* 241 U.S. 87, 91-92, 36 S.Ct. 493, 495 (1916) (Carmack Amendment to the Interstate Commerce Act); *Southern Surety Co.* v. *Oklahoma,* 241 U.S. 582, 587, 36 S.Ct. 692, 694 (1916) (Oklahoma enabling act and Oklahoma Constitution); *Armour Packing Co.* v. *United States,* 209 U.S. 66, 81, 82, 28 S.Ct. 428, 435, 436 (1907) ("the design of the statute to prohibit" "abuses of unequal rates"); *Antoni* v. *Greenhow,* 107 U.S. 769, 2 S.Ct. 91, 95 (1883) (rule applies to "those laws which affect its validity, construction, discharge, and enforcement"); *Walker* v. *Whitehead,* 83 U.S. 314, 317, 21 L.Ed. 357, 358 (1873) (Georgia statute held to impair obligation of contract); *United States ex rel. Von Hoffman* v. *City of Quincy,* 71 U.S. 535, 550 (1867) ("These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement"); *M'Cracken* v. *Hayward,* 11 L.Ed. 397, 399 (1844) ("laws in existence * * * measure of the obligation to perform"); *Ogden* v. *Saunders,* 6 L.Ed. 606, 621-622 (1827) ("the law of the contract * * * forming a part of it"; 17A C.J.S., *Contracts,* §330, at 295 (1963 ed.); 17 Am.Jur.2d, *Contracts,* §257, at 654-656 (1964 ed.); 3 *Corbin on Contracts,* §51, at 197 (1960 ed.); *Williston on Contracts,* §615, at 1767 (1936 ed.); 4 *Williston on Contracts,* §615, at 597 (3d ed. 1961). Thus, as the Ninth Circuit declared in *United States* v. *McKinnon,* 289 F.2d 908, 909 (C.A. 9, 1961), concerning a claim for extra work by a government contractor, "one just must take his government contracts subject to applicable statutes."

It must not be forgotten that we have even more in the case at bar; we have express contract references to the Act. Specific reference was, indeed, made in the subject government contract to the Davis-Bacon Act. Those contract provisions were, *first,* a statement that such construction work should be done by subcontracts which would contain Davis-Bacon Act stipulations, rather than by the contractor's own employees, and *second,* a letter dated concurrently with the date of the contract stating that if the contractor does perform Davis-Bacon work with its own employees, the contract will be modified to incorporate the Davis-Bacon Act stipulations. Again, because of the limited scope of discovery permitted thus far, it may be later found that further provisions and agreements exist. In any event, the law is clear that a reference in a contract to a statute renders that statute a part of the agreement. Further, it is clear that in construing a contract which rests upon a statute, the statute must be read into the contract, with the construction intended by the legislature. *Maryland-National Capital Park Commission* v. *Lynn,* 514 F.2d 829, 833 (C.A. D.C. 1975); *Personal Industrial Bankers, Inc.* v. *Citizens Budget Co.,* 80 F.2d 327, 328 (C.C.A. 6, 1935).

2. Petitioner's acts imply assumption of Davis-Bacon obligations. It is asserted in this cause by respondent and the respondent class that they, as employees of the petitioner, were assigned and did perform work constituting construction work within the meaning of the Davis-Bacon Act. At this point in the proceedings, and for purposes of the summary judgment now on appeal which was granted on other grounds, this assertion must be taken as true. It is clear, then, that to the extent the petitioner's employees were performing Davis-Bacon Act construction work so assigned to them, the petitioner is and has placed

itself in the position of a subcontractor under its prime contract. Article XXXIII ("Labor Provisions") of the contract prescribes that such work is to be done by subcontract which shall "contain the provisions relative to labor and wages" required by Davis-Bacon. In the capacity of a subcontractor performing construction work on the project, well knowing of the contract requirement that all such subcontractors are obligated to pay the statutory wages, petitioner must be deemed by implication to have undertaken those same obligations.[13]

It is not unusual for a general contractor also to act as a subcontractor on the job. Indeed, in *Bushman Construction Co.* v. *Conner,* 260 F.Supp. 779 (D.Colo., 1966), it is noted that "The prime contractor did only the cement and carpentry work. All of the other construction was subcontracted" (260 F.Supp. at 782). And anyone familiar with construction activities is familiar with the practice of the general contractor "acting as his own carpentry (or cement, or electrical, or plumbing, or painting) subcontractor."

That which is implied in a contract situation is as effectual as what is expressed. *Bulkley* v. *United States,* 86 U.S. 37, 40 (1874) (saying, in addition, that "Human affairs are largely conducted upon the principle of implications"; *Board of Supervisors* v. *Lackawanna Iron*

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[13] Indeed, petitioner in its capacity as prime contractor has entered into a number of construction subcontracts, all including the Davis-Bacon Act required stipulations and the standard contract clauses promulgated by procurement regulations and included within printed forms used with those subcontracts. Copies of certain of those subcontracts have been obtained by the respondent class, again through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.*

& Coal Co., 93 U.S. 619, 624, 23 L.Ed. 989, 991 (1877); *Perry* v. *Sindermann,* 408 U.S. 593, 599-602, 92 S.Ct. 2694, 2699-2700 (1972) (affirming reversal of a summary judgment in a teacher's action claiming the existence of a "*de facto* tenure program" for "absence of such an explicit contractual provision may not always foreclose the possibility"). Where a well-established practice or custom exists (such as that pursuant to which general contractors often undertake subcontractor functions as to certain crafts), it is assumed that the parties to the contract intend that practice or custom to apply, absent express language in the contract to the contrary. *Everett Plywood Corp.* v. *United States,* 512 F.2d 1082, 1089 (Ct.Cl. 1975) (also holding that "regulations in effect at the time of a contract are a useful guide in the resolution of a contract case"). Indeed, the rules with respect to the creation of implied contracts apply in government contract situations, and "A contract may be implied where all the formalities in connection with the execution of a contract have not been complied with" (91 C.J.S., *United States,* §89, at 170 (1955 ed.)).

Assuming then, *arguendo,* that by reason of the government contract in the case at bar our petitioner-contractor is not bound by the Davis-Bacon Act in its capacity as *prime contractor,* it is nonetheless bound as a *subcontractor* who, without question, is expressly authorized by that contract to perform Davis-Bacon Act work and likewise obligated to pay the statutory wage.

3. The Davis-Bacon Act Congressionally-mandated effects on the procurement process. No one can deny that the procurement process would be easier and cheaper for the government and for certain government contractors, had Congress not enacted the Davis-Bacon Act (40

U.S.C. §276a *et seq.*), the Walsh-Healey Public Contracts Act (41 U.S.C. §35 *et seq.*) and the McNamara-O'Hara Service Contract Act (41 U.S.C. §351 *et seq.*). Yet these statutes represent important policy decisions which have been consistently reaffirmed by Congress, nothwithstanding their impact on the procurement process. Thus, the Attorney General of the United States, in an opinion issued on March 9, 1979, in response to a request of the President (see 1979 Labor Law Reports (C.C.H.), ¶31,253 (4-13-79)), has noted:

> "Congress considered the contract labor standards statutes to be among the 'ancillary' statutes which affect procurement [citing at fn 32: S.Rept. 91-427, 91st Cong., 1st Sess., at 6, 13-14; H.R.Report 91-468, 91st Cong., 1st Sess., at 151.]. * * *
>
> "[These are] statutory socio-economic programs implemented through the procurement process * * * [which the 1969 Commission on Government Procurement] viewed * * * as extraneous burdens on the procurement system [noting at fn. 49: See CGP Report, vol. 1, at 111-18. The report refers to the Labor Department's wage-hour regulations as 'collateral' ones that 'affect' procurement. Id. at 33.] * * *
>
> "As the Commission report points out, these programs serve a broad variety of interests: labor, environment, small business, anti-discrimination, protection of domestic industry, and others. * * * The contract wage-hour statutes in particular are the result of a strong legislative concern that the government's general interest in efficient, economical procurement will not be satisfied at the expense of contractors' employees. [noting at fn. 52: See H.R. Rept. 1162, 74th Cong., 2d Sess., at 2 (Davis-Bacon Act); S.Rept. 1157, 74th Cong., 1st Sess., at 4 (Walsh-Healey Act); H.R.Rept. 948, 89th Cong., 1st Sess., at 3 (Service Contracting Act).]."

The effects of the legislative policies represented by the Davis-Bacon Act and thus described, are effects which the government procurement agencies and government contractors must accept, and to which the courts must defer. Our petitioner has, of course, any number of contractual, administrative, judicial and statutory remedies in proceedings involving the government, for any uncertainties, inequities and improprieties petitioner has sustained or may hereafter suffer by reason of its contract.[14]

II.

THE SUPREME COURT WILL CONSIDER ONLY THE "QUESTION PRESENTED" BY THE PETITIONER AND THOSE QUESTIONS FAIRLY COMPRISED THEREIN. THE QUESTION PRESENTED BY PETITIONER CONCERNS CONTRACT INTERPRETATION AND THE IMPACT OF THE DAVIS-BACON ACT ON THE INTERPRETATION OF ITS GOVERNMENT CONTRACT. ARGUMENTS BY PETITIONER TO THE EFFECT THAT RESPONDENT HAS NO RIGHT OF ACTION UNDER OR BY REASON OF THE ACT, AND THAT RESPONDENT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, ARE NOT SO FAIRLY COMPRISED AND HAVE ALREADY BEEN RECENTLY CONSIDERED BY THIS COURT TWICE IN RELATED LITIGATION.

Respondent and the respondent class respectfully submit that the question presented by petitioner in his with-

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[14] See, for example: (a) Contract Disputes Act of 1978, 41 U.S.C. §§601-613, P.L. 95-563, (b) Wunderlich Act, 41 U.S.C. §§321-322, (c) 42 U.S.C. §7194(a)(b), providing for Department of Energy adjustments to rules, regulations and orders to prevent special hardship, inequity or unfair distribution of burdens, (d) Disputes Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-7.802-5, (e) Equitable Adjustments Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-1.5004-2.

in Petition, does not fairly comprise certain arguments which petitioner attempts at various points in the Petition. In addition, it is clear that the petitioner is in this round-about and indirect manner, seeking to renew recently unsuccessful attempts in a related case[15] to prevail on those same arguments. Indeed, those recent attempts have been terminated only last year, in 1978, with the denial of the second petition for certiorari in that case.

These arguments may be characterized, briefly but accurately, as the following: (a) that respondent and his class have no implied right of action under or by reason of the Davis-Bacon Act, and (b) that respondent and his class have failed to exhaust administrative remedies. The conclusion that these arguments are but repetitions of identical claims so recently rejected, is not just that of this respondent. The Seventh Circuit, in its opinion in the instant case supporting its decision to reverse the summary judgment allowed in the district court, remarked, *inter alia* (see *Coutu* v. *Universities Research Association, Inc.*, 595 F.2d 396, 397 (C.A. 7, 1979), and Appendix A at A2):

> "We held in *McDaniel* v. *University of Chicago*, 512 F.2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F.2d 689 (7th Cir. 1977), certiorari denied, 434 U.S.

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[15] *McDaniel* v. *University of Chicago*, 512 F.2d 583 (C.A. 7, 1975), vacated and remanded "for further consideration in light of *SIPC* v. *Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)", 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 30 (1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780 (1978). Counsel are the same in both the instant *Coutu* and the *McDaniel* cases.

> 1033, 98 S.Ct. 765, 54 L.Ed.2d 780, that employees have an implied private right of action to sue for wages due under the Act. Our decision in the present case flows directly from the *McDaniel* opinions. The complications arise only from the procedural posture of the case and from defendant's renewed attempts to establish an exhaustion requirement."

The "Question Presented" in the Petition to which this brief in opposition responds, reads in full as follows (petition, at 2):

> "Whether the Court of Appeals, reversing the District Court, erroneously construed the Davis-Bacon Act by holding that the District Court had jurisdiction thereunder to alter in favor of a third party substantive terms of a federal contract which was valid as between the contracting parties."

That question concerns, and may be deemed to comprise subsidiary questions dealing with, contract interpretation and the impact of the Davis-Bacon Act on the interpretation of petitioner's government contract. It certainly does not comprise or suggest, even remotely, arguments concerning the existence of an implied right of action or the existence of an exhaustion requirement.

Respondent, individually and on behalf of the respondent class, is prepared again to brief these arguments; and respondent will continue to be prepared to brief them as long and as many times as petitioner and its counsel and the nature of the issues demand. But a respondent should not be required to do so when the arguments are but repetitions of identical claims so recently made and rejected, when they are not reasonably subsumed under a question actually presented by a petitioner seeking review on writ of certiorari, and when this Court has di-

rected that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court" (see Supreme Court Rule 23-1(c)).[16]

CONCLUSION

There are no special and important reasons for this Court to grant certiorari in this cause. The Seventh Circuit has not rendered a decision in conflict with decisions of this Court or of other courts of appeals; nor has it decided an important question of federal law which has not been, but should be, settled by this Court; nor has it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; nor are there other reasons why the Court should grant the discretionary writ.

The Seventh Circuit was manifestly correct when it ruled that summary judgment should not have been granted against the respondent and the respondent class, that the judgment dismissing the complaint be reversed, and that the cause be remanded to the district court for further proceedings.

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[16] Respondent submits, in addition, that the fact that these arguments have been so recently and so authoritatively rejected—by the Court of Appeals for substance and by the United States Supreme Court for review on certiorari—forms additional support for respondent's position that there are no special and important reasons for the grant of certiorari in this case.

Respondent, individually and on behalf of his class, requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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